

Maureen C. VanderMay, WSBA No. 16742
The VanderMay Law Firm PC
2021 S. Jones Blvd.
Las Vegas, Nevada 89146
(702) 588-8053

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELF-MAN, LLC,

Plaintiff,

v.

C. G. CHINQUE ALBRIGHT,
ET AL.,

Defendants.

Case No.: 2:13-CV-00115-TOR

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO MOTION TO DISMISS,
OR FOR MORE DEFINITE STATEMENT,
BY DEFENDANTS JOSEPHINE
GEROE AND DAVID STARR

Defendants Josephine Geroe and David Starr (referred to herein collectively as "Defendants") have moved for dismissal with prejudice of Plaintiff Elf-Man LLC's First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e). For the reasons set forth below, Plaintiff respectfully submits that Defendants' motion should be denied.

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff commenced this action for copyright infringement against twenty-nine unnamed Defendants based upon the unlawful downloading via BitTorrent of its copyrighted motion picture entitled *Elf-Man*. ECF No. 1. In order to determine the Defendants' identities, Plaintiff sought and was granted leave to subpoena

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS – Page 1

1 various Internet Service Providers ("ISPs") for the identity of the subscribers to
2 each of the Internet Protocol ("IP") addresses listed on Exhibit 1 to Plaintiff's
3 complaint. ECF No. 1-1. After the Court denied various motions relating to these
4 subpoenas Plaintiff filed its First Amended Complaint naming 25 Defendants.
5 Plaintiff filed notices of dismissal with respect to the remaining Defendants. ECF
6 Nos. 55, 71 and 73.

7 Plaintiff's First Amended Complaint sets forth Plaintiff's claims in the
8 alternative, alleging that the named Defendants violated the United States
9 Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., ("the Copyright Act") in one of
10 two ways: either by way of direct and contributory infringement as a result of
11 having downloaded Plaintiff's motion picture via BitTorrent and facilitating such
12 infringement by other BitTorrent users or by way of indirect infringement
13 stemming from their failing to "secure, police and protect the use of their Internet
14 service against illegal conduct." ECF No. 26, p. 23, ¶170. Plaintiff also altered its
15 damages claims, seeking \$30,000 in statutory damages against direct /
16 contributory infringers but damages not to exceed the statutory minimum of
17 \$750.00 on its indirect infringement claim. *Id.* at p. 24, ¶ 177. On all of its claims,
18 Plaintiff also seeks injunctive relief against further infringement. *Id.* at p. 22, ¶
19 158, p. 23, ¶ 166 & p. 24, ¶ 176.

20 Defendants' motion claims that Plaintiff's actions in pursuing its claims are
21 unethical and unwarranted and suggests that unsuspecting lay persons are being
22 subjected to abusive tactics. ECF No. 76 at pp. 3, 18-19. Defendants presumably
23 cast aspersions on Plaintiff and its counsel to deflect attention from the following
24 facts which gave rise to these claims: 1) Plaintiff's copyrighted work was stolen;
25 and 2) the thefts occurred through IP addresses that non-party ISPs have stated
26 were assigned to Defendants. Despite Defendants' repeated suggestion that they

1 are merely innocent subscribers to Internet service, they have each played a causal
2 role in the infringement of Plaintiff's copyright: they either personally
3 downloaded Plaintiff's motion picture *Elf-Man* via BitTorrent and are liable as
4 direct and contributory infringers or they actively provided and paid for Internet
5 access used by another in a manner which was inconsistent with the requirements
6 of their ISPs and which allowed these thefts to occur.

7 The fallacy of Defendants' argument becomes readily apparent if the
8 technology is put aside and the same facts are applied to a more conventional
9 paradigm. In the present case, Plaintiff has identified an infringing IP address that
10 was used to steal its motion picture and a subscriber who had exclusive ownership
11 and control of the IP address at the relevant time. If instead this were a theft
12 involving an automobile that was used to drive to and from a crime scene, and
13 Plaintiff had identified a license plate and the sole and exclusive owner of the
14 automobile, Defendants' arguments become transparently false. Defendants may
15 argue that other parties may have had access to their automobile / IP address, but
16 they do not deny that the IP address was assigned to them exclusively for their use.
17 Any subsequent grant of access to other parties was permissive. The argument
18 that 'anyone could be driving my car' is plausible, but at most, factual in nature.
19 In essence Defendants are arguing for dismissal through an implicit application of
20 a "willful blind eye" defense, something soundly rejected by courts that have
21 addressed the issue. *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F. 3d 19 (2nd Cir.
22 2013).

23 II. LEGAL ARGUMENT

24 A. THE STANDARD GOVERNING MOTIONS TO DISMISS 25 PURSUANT TO FED. R. CIV. P. 12(b)(6)

26 After setting forth the standards for granting a motion to dismiss under Fed.

1 R. Civ. P. 12(b)(6) articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007),
 2 and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Ninth Circuit has stated as follows:

3 "A Rule 12(b)(6) motion tests the legal sufficiency of a claim. A
 4 claim may be dismissed only if 'it appears beyond doubt that the
 5 plaintiff can prove no set of facts in support of his claim which would
 6 entitle him to relief.'" *Navarro v. Block*, 250 F.3d 729, 732 (9th
 7 Cir.2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct.
 8 99, 2 L.Ed.2d 80 (1957)). 'To survive a motion to dismiss, a
 9 complaint must contain sufficient factual matter, accepted as true, to
 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at
 1949 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). 'A claim
 has facial plausibility when the plaintiff pleads factual content that
 allows the court to draw the reasonable inference that the defendant is
 liable for the misconduct alleged.' *Id.*

10 *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011).

11 The Wright & Miller treatise, with extensive citation to authority, states as
 12 follows with respect to motions under Rule 12(b)(6):

13 "[F]or the purposes of the motion to dismiss, (1) the complaint is
 14 construed in the light most favorable to the plaintiff, (2) its
 15 allegations are taken as true, and (3) all reasonable inferences that can
 be drawn from the pleading are drawn in favor of the pleader."

16 Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1357. *See also*
 17 *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 956 (9th Cir.
 18 2013) ("When evaluating a Rule 12(b)(6) motion, the district court must accept all
 19 material allegations in the complaint as true, and construe them in the light most
 20 favorable to the non-moving party.").

21 Particular caution should be employed when a motion to dismiss is asserted
 22 against a pleading which employs a novel theory of liability. *Electrical Const. &*
 23 *Maintenance Co., Inc. v. Maeda Pacific Corp.*, 764 F.2d 619, 623 (9th Cir. 1985)
 24 ("The court should be especially reluctant to dismiss on the basis of the pleadings
 25 when the asserted theory of liability is novel or extreme, since it is important that
 26 new legal theories be explored and assayed in the light of actual facts rather than a

pleader's suppositions.") (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure*: Civil Sec. 1357, at 601-603 (1969)). See also *Baker v. Cuomo*, 58 F.3d 814, 818-19 (2nd Cir. 1995) ("Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development.").

B. BECAUSE THEIR ARGUMENTS IN SUPPORT OF DISMISSAL ONLY RELATE TO PLAINTIFF'S THIRD CLAIM FOR RELIEF, DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT IN ITS ENTIRETY SHOULD BE DENIED

Defendants argue that if Plaintiff has failed to state a claim in any of its three claims for relief that its First Amended Complaint must be dismissed in its entirety. ECF No. 76 at p. 6. They assert that "[a] Plaintiff who makes equivocal, alternative allegations in a list of 'and/or' possibilities fails to state a claim on which relief can be granted if any of the potential alternative possibilities are insufficient to state a claim for relief." *Id.*

Defendants rely upon various decisions in support of this assertion, none of which are apposite. *Patterson v. Novartis Pharms. Corp.*, No. 10-5886 (6th Cir. August 23, 2011) (Attachment C to Defendants' motion, ECF No. 76-3), concluded that the plaintiff in a product liability action had not stated a claim under Massachusetts law because she failed to allege that the drug at issue had been manufactured by the defendant – an allegation that she had been given either the defendant's drug or its generic equivalent was insufficient. *Id.* at 4. The Court's ruling stands to reason since the defendant manufacturer had made the proprietary drug but not the generic equivalent. Similarly, in *Gevo, Inc. v. Butamax Advanced Biofuels LLC*, No. 1:12-cv-01724-SLR (D. Del. July 8, 2013) (Attachment D to Defendants' motion, ECF No. 76-4), the Court concluded that a combination of equivocal language and lack of specificity in the complaint left

1 open the possibility that one of the defendants had not engaged in the prohibited
2 conduct.¹

3 By contrast, in the present controversy, Plaintiff alleges claims in the
4 alternative pursuant to Fed. R. Civ. P. 8(d)(2). Plaintiff's First Amended
5 Complaint alleges that Defendants have violated the Copyright Act *either* by way
6 of direct infringement (First Claim for Relief) and contributory infringement
7 (Second Claim for Relief) *or* by way of indirect infringement (Third Claim for
8 Relief). ECF No. 26 at pp. 21-24, ¶¶ 150-176. As a result, several of the First
9 Amended Complaint's factual allegations are cast in the alternative. For example,
10 paragraph 22, which Defendants refer to as "encapsulat[ing] the equivocal and
11 hypothetical nature of Plaintiff's complaint" ECF No. 76 at p. 9, simply reflects
12

13 ¹ The remaining decisions relied upon by Defendants, *Pa. Empls. Benefit*
14 *Trust Fund v. AstraZeneca Pharm. LP*, No. 6:09-cv-5003 Orl-22DAB (M.D. Fla.
15 July 20, 2009) (Attachment E to Defendants' motion, ECF No. 76-5); *Gregory v.*
16 *Dillard's, Inc.*, 565 F.3d 464 (8th Cir. 2009); and *AllGood Entertainment, Inc. v.*
17 *Dileo Entertainment & Touring, Inc.*, 726 F. Supp. 2d 307 (S.D.N.Y. 2010), are
18 equally inapposite. The equivocation cited by the courts in these decisions resulted
19 in the failure to plead with sufficient specificity the elements of the claims at issue.
20 None of these decisions appear to have involved claims pled in the alternative
21 pursuant to Fed. R. Civ. P. 8(d)(2), nor do they call into question the manner in
22 which Plaintiff has pled its alternative claims.
23

1 this alternative pleading. Paragraph 22 sets forth a description of the Defendants'
2 conduct in violation of the Copyright Act which takes account of the fact that
3 Plaintiff has alleged that each Defendant engaged in either direct and contributory
4 infringement on the one hand or indirect infringement on the other. The First
5 Amended Complaint gives Defendants clear notice of the alternative claims pled
6 against them and the factual bases for these claims. If, however, the Court views
7 the inclusion of a general description of the facts which takes account of these
8 alternative claims as problematic, Plaintiff submits that the remedy lies in the
9 filing of an amended complaint and not in the dismissal of this action with
10 prejudice.

11 Defendants ignore the fact that Fed. R. Civ. P. 8(d)(2) is directly contrary to
12 their assertion that if any of Plaintiff's claims are insufficient that all must be
13 dismissed. The rule provides in its entirety as follows: "*Alternative Statements of*
14 *a Claim or Defense*. A party may set out 2 or more statements of a claim or
15 defense alternatively or hypothetically, either in a single count or defense or in
16 separate ones. If a party makes alternative statements, the pleading is sufficient if
17 any one of them is sufficient." As such, even if the Court were to conclude that
18 Plaintiff's Third Claim for Relief (the only claim addressed in Defendants'
19 motion) is not sufficient as a matter of law, Plaintiff's alternative claims for direct
20 and contributory infringement would stand.

21 Defendants also ignore decisions from other districts which conclude that
22 when a moving party asserts multiple claims and one of these is found to be
23 insufficient under Fed. R. Civ. P. 12(b)(6), only the insufficient claim is subject to
24 dismissal. *See, e.g., Taylerson v. American Airlines, Inc.*, 183 F. Supp. 882, 884
25 (S.D.N.Y. 1960) ("A complaint which contains alternative statements of the claim,
26 some of which are insufficient, will not be dismissed if any one alternative

1 statement supports the claim."); *Bleecker v. Drury*, 3 F.R.D. 325, 327 (W.D.N.Y.
2 1944) (where defendant seeks dismissal of entire action for failure to state a claim
3 the motion must be denied if any cause of action is sufficient).

4 C. PLAINTIFF'S THIRD CLAIM FOR RELIEF STATES A CLAIM
5 FOR INDIRECT COPYRIGHT INFRINGEMENT

6 Defendants argue that Plaintiff's claim for indirect copyright infringement,
7 which is set forth in its Third Claim for Relief, fails because it does not state a
8 claim consistent with the decisional law governing contributory or vicarious
9 infringement. ECF No. 76 at pp. 11-17. For the reasons outlined below, Plaintiff
10 submits that claims for indirect infringement under the Copyright Act are not
11 limited to these two doctrines and that its Third Claim for Relief states a claim
12 upon which relief can be granted.

13 Defendants take a categorical approach to the issue of when a person may
14 be found liable for indirect copyright infringement. They treat two variants of
15 indirect infringement that have been addressed extensively in the decisional law as
16 the only possible theories upon which liability for indirect infringement may be
17 established. This approach may be sound when applied in the context of claims
18 that are wholly statutory. However, where the governing law is largely the
19 product of the judiciary's interpretation of broadly phrased legislation, this
20 approach is misplaced.

21 Defendants argue that the appellate courts have "developed two doctrines by
22 which a defendant can be held liable for the infringement of another: Contributory
23 Infringement and Vicarious Infringement" and that "Plaintiff fails to state a claim
24 under either doctrine." ECF No. 76 at p. 11. Nothing contained in the existing law
25 limits claims for indirect infringement to these two categories and, indeed, the
26 U.S. Supreme Court has cautioned against the narrow view espoused by

1 Defendants.

2 The development of the decisional law governing copyright infringement
3 illustrates that the courts have been instrumental in defining the circumstances
4 under which a party may be held liable for the direct infringement of others. The
5 U.S. Supreme Court's seminal decision in *Sony Corp. v. Universal City Studios,*
6 *Inc.*, 464 U.S. 417 (1983), concerned allegations of copyright infringement against
7 the manufacturer and seller of a video recording device. The plaintiff alleged that
8 the manufacturer was liable for the infringement of its copyrights by users of the
9 recording device as a result of its marketing of the device. 464 U.S. at 419.

10 The majority opinion in *Sony* described the development of the law
11 governing liability for copyright infringement by others as follows:

12 "The Copyright Act does not expressly render anyone liable for
13 infringement committed by another. In contrast, the Patent Act
14 expressly brands anyone who 'actively induces infringement of a
15 patent' as an infringer, 35 U.S.C. § 271(b), and further imposes
16 liability on certain individuals labeled 'contributory' infringers, *id.*, §
17 271(c). The absence of such express language in the copyright statute
18 does not preclude the imposition of liability for copyright
infringements on certain parties who have not themselves engaged in
the infringing activity. For vicarious liability is imposed in virtually
all areas of the law, and the concept of contributory infringement is
merely a species of the broader problem of identifying the
circumstances in which it is just to hold one individual accountable
for the actions of another."

19 464 U.S. at 434-35 (footnote omitted).

20 In a footnote to this passage, the Court noted that the lines between the
21 different types of infringement are not clearly drawn. *Id.* at 435 n.17 ("As the
22 District Court correctly observed, however, 'the lines between direct infringement,
23 contributory infringement, and vicarious liability are not clearly drawn. . . .' 480
24 F. Supp. 457-458. The lack of clarity in this area may, in part, be attributable to
25 the fact that an infringer is not merely one who uses a work without authorization
26 by the copyright owner, but also one who authorizes the use of a copyrighted work

1 without actual authority from the copyright owner.").

2 The *Sony* majority went on to describe the origins of the contributory
3 infringement doctrine in Justice Holmes' opinion in *Kalem Co. v. Harper*
4 *Brothers*, 222 U.S. 55 (1911), and to discuss contributory infringement under the
5 law governing patents. 464 U.S. at 435-42. Based upon the evidence concerning
6 the intended use of the recording device and because the device was "capable of
7 commercially significant noninfringing uses," the Court held that the manufacturer
8 could not be held liable for contributory copyright infringement stemming from
9 the use of the device by consumers to record the plaintiffs' copyrighted works. *Id.*
10 at 442.

11 The U.S. Supreme Court provided further guidance with respect to the
12 circumstances under which a party may be held liable for the direct copyright
13 infringement of another in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,
14 545 U.S. 913 (2005) ("*Grokster III*"). *Grokster III* concerned claims of indirect
15 infringement by copyright owners against defendants which had distributed free
16 software that allowed users to share electronic files through peer-to-peer networks.
17 Relying upon the *Sony* decision, the district court granted summary judgment to
18 the defendants and the Ninth Circuit affirmed. In a unanimous opinion, the Court
19 in *Grokster III* reversed, concluding that the Ninth Circuit had misapplied the
20 principles set forth in its *Sony* decision. The Court stated as follows:

21 "One infringes contributorily by intentionally inducing or
22 encouraging direct infringement, *see Gershwin Pub. Corp. v.*
23 *Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (CA2
24 1971), and infringes vicariously by profiting from direct infringement
25 while declining to exercise a right to stop or limit it, *Shapiro,*
26 *Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963).
Although '[t]he Copyright Act does not expressly render anyone
liable for infringement committed by another,' *Sony Corp. v.*
Universal City Studios, 464 U. S., at 434, these doctrines of
secondary liability emerged from common law principles and are well
established in the law, *id.*, at 486 (Blackmun, J., dissenting); *Kalem*

1 *Co. v. Harper Brothers*, 222 U. S. 55, 62-63 (1911); *Gershwin Pub.*
 2 *Corp. v. Columbia Artists Management, supra*, at 1162; 3 M. Nimmer
 & D. Nimmer, Copyright § 12.04[A] (2005).

3 "Despite the currency of these principles of secondary liability, this
 4 Court has dealt with secondary copyright infringement in only one
 5 recent case, and because [plaintiff] has tailored its principal claim to
 6 our opinion there, a look at our earlier holding is in order. In *Sony*
 7 *Corp. v. Universal City Studios, supra*, this Court addressed a claim
 8 that secondary liability for infringement can arise from the very
 9 distribution of a commercial product. There, the product, novel at the
 10 time, was what we know today as the videocassette recorder or VCR.
 11 Copyright holders sued Sony as the manufacturer, claiming it was
 12 contributorily liable for infringement that occurred when VCR
 13 owners taped copyrighted programs because it supplied the means
 14 used to infringe, and it had constructive knowledge that infringement
 would occur. At the trial on the merits, the evidence showed that the
 principal use of the VCR was for "time-shifting," or taping a
 program for later viewing at a more convenient time, which the Court
 found to be a fair, not an infringing, use. *Id.*, at 423-424. There was
 no evidence that Sony had expressed an object of bringing about
 taping in violation of copyright or had taken active steps to increase
 its profits from unlawful taping. *Id.*, at 438. Although Sony's
 advertisements urged consumers to buy the VCR to "record favorite
 shows" or "build a library" of recorded programs, *id.*, at 459
 (Blackmun, J., dissenting), neither of these uses was necessarily
 infringing, *id.*, at 424, 454-455.

15 " On those facts, with no evidence of stated or indicated intent to
 16 promote infringing uses, the only conceivable basis for imposing
 17 liability was on a theory of contributory infringement arising from its
 18 sale of VCRs to consumers with knowledge that some would use
 them to infringe. *Id.*, at 439. But because the VCR was 'capable of
 commercially significant noninfringing uses,' we held the
 manufacturer could not be faulted solely on the basis of its
 distribution. *Id.*, at 442."

19 545 U.S. 931-32 (footnote omitted).

20 The Court reversed the grant of summary judgment to the defendants,
 21 explaining that the *Sony* rationale did not apply to shield the defendants from
 22 liability where "evidence of the distributor's words and deeds going beyond
 23 distribution as such shows a purpose to cause and profit from third-party acts of
 24 copyright infringement." *Id.* at 941.

25 In rejecting the broad reading of *Sony* relied upon by the defendants and
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1 accepted by the Ninth Circuit, the Court noted that "nothing in *Sony* requires
2 courts to ignore evidence of intent if there is such evidence, and the case was
3 never meant to foreclose rules of fault-based liability derived from the common
4 law." 545 U.S. at 934-35.²

5 The decisions in *Sony* and *Grokster III* demonstrate that Defendants'
6 categorical approach to the issue of whether a party may be held liable for indirect
7 copyright infringement is misplaced. Rather than looking solely to what
8 circumstances have resulted in findings of liability in prior cases, the court is to
9 consider the facts at issue in a given controversy and to look at common law

10
11 ²Defendants' discussion of *Sony* and *Grokster III* incorrectly assumes that
12 these decisions establish the sole grounds upon which liability for indirect
13 copyright infringement can be established. ECF No. 76 at pp. 12-17. In Plaintiff's
14 view, this reading of these decisions is too simplistic and, indeed, is inconsistent
15 with the Court's explanation of its *Sony* decision in *Grokster III*. Indeed,
16 Defendants' broad brush approach to *Grokster III* is akin to the broad reading of
17 *Sony* that was specifically rejected by the unanimous *Grokster III* opinion.
18 Further, Defendants' analysis is flawed to the extent that it reads *Grokster III* to
19 preclude liability for indirect infringement based upon "mere knowledge." ECF
20 No. 76 at p. 14. Defendants ignore the fact that the Court's statement was made in
21 the context of its discussion of when a product's distributor can be held liable
22 based upon a theory of inducement of infringement.

1 principles to identify "the circumstances in which it is just to hold one individual
2 accountable for the actions of another." *Sony*, 464 U.S. at 435. Moreover, the
3 Supreme Court has expressly indicated that additional fault-based doctrines may
4 be developed by looking to common law principles. *Grokster III*, 545 U.S. at 934.

5 Despite Defendants' implication that if they are not the direct infringers
6 then they are essentially innocent bystanders who bear no responsibility for the
7 subject infringement, the fact is that Plaintiff has alleged that they played an
8 instrumental role in said infringement. The First Amended Complaint alleges that
9 Defendants are liable either directly for unlawfully downloading *Elf-Man* and
10 contributorily by participation in the exchanges that are consummated by way of
11 BitTorrent downloading or, in the alternative, indirectly as a result of their having
12 permitted other persons to access the Internet by way of their assigned IP address
13 without adequate supervision and with apparent disregard of the property rights of
14 others, including Plaintiff.³

15
16 ³ Defendants' motion takes Plaintiff to task, claiming that it "has no clue and
17 no basis to allege what any Defendant did or did not do, did or did not know, or
18 did or did not intend with regard to any alleged BitTorrent infringement." ECF
19 No.76 at p. 10. Plaintiff submits that its allegations regarding the use of
20 Defendants' IP addresses for the subject downloading and Defendants' failure to
21 secure or supervise their Internet access are more than sufficient to state claims for
22 direct, contributory and indirect infringement. The circumstances concerning how
23 these Defendants' IP addresses came to be used for the infringement of Plaintiff's
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1 The Copyright Act, read in conjunction with the above-referenced
2 precedent, provides for the imposition of liability for copyright infringement by
3 another in a variety of circumstances, including but by no means limited to the
4 variants referenced in Defendants' motion. Given Defendants' causal role in the
5 unlawful downloading of Plaintiff's copyrighted work in violation of their
6 agreements with their ISPs, liability for indirect infringement can be established
7 based upon the contract law principle which allows claims to be asserted by
8 intended third party beneficiaries of contracts. *See* Restatement (Second) of
9 Contracts, § 302(1). A third party is an intended beneficiary of a contract "if
10 recognition of a right to performance in the beneficiary is appropriate to effectuate
11 the intention of the parties and . . . (b) the circumstances indicate that the promisee
12 intends to give the beneficiary the benefit of the promised performance." *Id.*
13 Moreover, in some circumstances such a right attaches without regard to the
14 intention of the parties. *Id.* at Comment d ("In some cases an overriding policy,
15 which may be embodied in a statute, requires recognition of such a right without
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18 copyright are proper subjects for discovery. Indeed, Plaintiff anticipates seeking
19 by way of discovery information concerning whether Defendants received notices
20 from their ISPs concerning unlawful downloading, whether they allowed minor
21 children to engage in such conduct, whether they failed to secure their access as
22 required by their ISP agreements, and whether they used BitTorrent themselves to
23 download Plaintiff's motion picture. Plaintiff can hardly be expected to have
24
25
26 procured such information at this stage of these proceedings.

1 regard to the intention of the parties.").⁴

2 Plaintiff alleges that each Defendant entered into a contract with his or her
3 Internet Service Provider, ECF No. 26 at p. 14, ¶ 109, and that a standard term in
4 such contracts is that the service may not be used for illegal activity, *id.* at ¶ 112.
5 As a copyright holder, Plaintiff is an intended beneficiary of the use limitations
6 imposed in these ISP agreements. Indeed, its position is akin to the intended
7 beneficiary referenced in the following illustration from § 302 of the Restatement
8 (Second) of Contracts:

9 "A, the operator of a chicken processing and fertilizer plant, contracts
10 with B, a municipality, to use B's sewage system. With the purpose
11 of preventing harm to landowners downstream from its system, B
12 obtains from A a promise to remove specified types of waste from its
13 deposits into the system. C, a downstream landowner, is an intended
14 beneficiary under Subsection(1)(b) [of § 302]."

15 Restatement (Second) of Contracts, illus. 10.

16 Like the municipality in this illustration, the Internet Service Providers by
17 contract impose restrictions on their subscribers, including Defendants, for the
18 protection of copyright holders, such as Plaintiff. As such, Plaintiff should be
19 treated as an intended third party beneficiary of the agreements between
20 Defendants and their ISPs.

21 In the event that through discovery Plaintiff establishes that Defendants
22 failed to comply with these use limitations and thereby permitted the unlawful
23

24 ⁴ When considering "general principles for interpreting contracts," the Ninth
25 Circuit has looked to the Restatement (Second) of Contracts's provisions
26 regarding intended third party beneficiaries. *See, e.g., Klamath Water Users*
27 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210-11 (9th Cir. 1999).

1 downloading of *Elf-Man* by another, this Court can and should conclude that these
2 failures constituted the indirect infringement of Plaintiff's copyright in violation of
3 the Copyright Act.⁵

4
5 ⁵Liability for indirect infringement could also be based upon negligence
6 principles. Plaintiff recognizes that some districts have dismissed state law
7 negligence claims in BitTorrent infringement actions on preemption grounds. *See,*
8 *e.g., Liberty Media Holdings, LLC v. Tabora*, No. 12 CV 2234 (LAK) (S.D.N.Y.
9 July 9, 2012) (attached hereto as Attachment 1). Plaintiff submits that the
10 preemption analysis would not apply to its claims because rather than asserting a
11 state law negligence claim, its claim for direct infringement is based upon the
12 Copyright Act and that the law of negligence simply provides an analogy for the
13 Court in defining the parameters of indirect infringement under the Act.

14
15 The elements of a cause of action for negligence are set out in § 281 of the
16 Restatement (Second) of Torts as follows:

17
18 "The actor is liable for an invasion of an interest of another, if:

19
20
21 "(a) the interest invaded is protected against unintentional
22 invasion, and

23
24
25 "(b) the conduct of the actor is negligent with respect to the other,
26 or a class of persons within which he is included, and

Defendants claim at several points that Plaintiff has not alleged scienter in its claim for indirect infringement. ECF No. 76 at pp. 11, 14. This is incorrect. Plaintiff alleges the manner in which Defendants engaged in indirect infringement by "fail[ing] to secure, police and protect the use of their Internet service against illegal conduct, including the downloading and sharing of Plaintiff's motion picture by others." ECF No. 26 at p. 23, ¶ 170. Plaintiff alleges further that "Defendants' conduct has been willful, intentional and in disregard of and indifferent to Plaintiff's rights." *Id.* at p. 24, ¶ 172. To the extent that Defendants claim that Plaintiff is required to allege that they intentionally encouraged willful infringement, Plaintiff submits even if this is correct with respect to the two variants of indirect liability discussed by Defendants, i.e. contributory infringement and vicarious infringement, nothing in the Copyright Act nor in the decisional law requires that Plaintiff so allege when proceeding under its theory of liability for indirect infringement. Indeed, it is Defendants' disregard of their

"(c) the actor's conduct is a legal cause of the invasion; and

"(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion."

Plaintiff submits that its allegations that its copyright in *Elf-Man* has been infringed upon coupled with the allegation that Defendants "failed to secure, police and protect the sue of their Internet service against illegal conduct," ECF No. 26 at p. 4, ¶¶ 22-23& p. 23 ¶ 170, either states a claim based upon this theory of liability or can be amended to do so.

1 obligations to secure their access and not any intentional encouragement of
2 infringement that is relevant to Plaintiff's claim. Moreover, *Grokster III* makes
3 explicit reference to "fault-based liability derived from the common law." 545
4 U.S. at 934-35, a term which encompasses both the knowing breach of a
5 subscriber's contract with an Internet Service Provider and negligence in the
6 operation and securing of one's Internet access.⁶

7 As the foregoing demonstrates, Plaintiff's theory of liability for indirect
8 infringement does not fall squarely within any of the doctrines referenced in the
9 existing decisional law. Because, however, it is based upon U.S. Supreme Court
10 precedent concerning liability for the infringing conduct of others under the
11 Copyright Act and posits establishing liability for indirect infringement based
12 upon common law fault-based principles, Defendant's motion to dismiss should be
13 denied and Plaintiff's theory should be "explored and assayed in the light of actual
14 facts rather than a pleader's suppositions." *Electrical Const. & Maintenance Co.,*
15 *Inc. v. Maeda Pacific Corp.*, 764 F.2d 619, 623 (9th Cir. 1985) (quoting 5 C.
16 Wright & A. Miller, Federal Practice and Procedure: Civil Sec. 1357, at 601-603

17
18 ⁶Defendant looks by analogy to the telephone context, likening the
19 connection between a subscriber to an IP address to a telephone account holder.
20 ECF No. 76 at p. 3. What Defendant ignores is that the telephone account holder
21 in many circumstances will be held accountable for the use to which his or her
22 telephone service is put. For example, the account holder will be held accountable
23 to pay for the use of the telephone line and cannot evade responsibility by simply
24 asserting that someone else used it to make a costly overseas call.
25

1 (1969)).

2 D. IF THE COURT OPTS TO DISMISS PLAINTIFF'S FIRST
3 AMENDED COMPLAINT, DISMISSAL SHOULD BE WITHOUT
4 PREJUDICE AND PLAINTIFF SHOULD BE AFFORDED LEAVE
5 TO AMEND

6 Defendants argue that in the event that the Court grants their motion to
7 dismiss that it should be with prejudice. ECF No. 76 at p. 18. Defendants'
8 position is contrary to the governing law.

9 Defendants' motion is directed solely against Plaintiff's Third Claim for
10 Relief. ECF No. 76 at p. 1 (claiming that Plaintiff's First and Second Claims for
11 Relief "have no evidentiary basis" but that "this motion deals with the latter" –
12 referring to Plaintiff's Third Claim for Relief). Even if the Court construes their
13 motion to dismiss the First Amended Complaint in its entirety as one for dismissal
14 of its Third Claim for Relief, Plaintiff's First and Second Claims for Relief would
15 stand. Presumably Defendants do not seek dismissal based upon alleged
16 shortcomings in Plaintiff's First and Second Claims for Relief because Rule
17 12(b)(6) motions against claims for direct and contributory infringement in the
18 BitTorrent context have been largely unsuccessful on other districts. *See, e.g.,*
19 *Malibu Media, LLC v. Does 1-11*, 12-cv-3810 (ER), S.D.N.Y. July 16, 2013
20 (attached hereto as Attachment 2); *Malibu Media, LLC v. Pelizzo*, 12-22768-CIV-
21 SEITZ/SIMONTON (S.D.Fla. Dec. 20, 2012) (attached hereto as Attachment 3).

22 Further, dismissal with prejudice of a complaint for failure to state a claim is
23 only permissible when the complaint "could not be saved by any amendment."
24 *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir 2002); *Polich v. Burlington*
25 *Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir.1991). *See also Oki Semiconductor*
26 *Co. v. Wells Fargo Bank, Nat. Assen*, 298 F.3d 768, 772 (9th Cir 2002) (noting that
27 dismissal without leave to amend under F.R.Civ.P. 12(b)(6) is only proper if the

1 complaint could not be cured by amendment). Indeed, dismissal without leave
2 to amend "is proper only in extraordinary cases." *Brown v. Bogan*, 320 F.3d 1023,
3 1028 (9th Cir 2003).

4 In the event that the Court concludes that the manner in which Plaintiff has
5 stated its alternative claims is problematic, Plaintiff requests leave to amend its
6 complaint to remedy any such concerns.

7 E. DEFENDANT'S ALTERNATIVE MOTION FOR A MORE
8 DEFINITE STATEMENT SHOULD BE DENIED

9 In the alternative, Defendants seeks an order pursuant to Fed. R. Civ. P.
10 12(e) directing Plaintiff to make its complaint more definite and certain. ECF No.
11 76 at pp. 18-20.

12 Motions under Rule 12(e) are "proper only when the pleading to which it is
13 addressed is so vague that it cannot be responded to" *In re Hanford Nuclear*
14 *Reservation Litigation*, 780 F. Supp. 1551, 1583 (E.D. Wa. 1991) (quoting 5A
15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and*
16 *Procedure: Jurisdiction 2d* § 1377 at 601 (1984)). Such motions are disfavored
17 and granting only sparingly. *Id.*

18 Defendants' motion fails to meet this standard. Defendants provide a list of
19 seven requested "clarifications." The first three of these requests would in effect
20 require Plaintiff to abandon its alternative pleading by making allegations that
21 each Defendant engaged in direct infringement. Plaintiff submits that its
22 alternative pleading is specifically permitted by Fed. R. Civ. P. 8(d)(2) and it
23 should not be required to abandon this alternative approach at this preliminary
24 stage of this litigation. The remaining requests appear to concern variants of
25 indirect infringement addressed in Defendants' motion but not alleged in
26 Plaintiff's First Amended Complaint. As such, they have no relevance to this

1 action and these requests should be denied.

2 The First Amended Complaint gives Defendants fair notice of Plaintiff's
3 claims and, therefore, their alternative motion should be denied.

4 III. CONCLUSION

5 For the reasons set forth herein, Plaintiff requests that Defendants' motions
6 should be denied.

7 DATED: November 22, 2013

8 Respectfully submitted,

9 The VanderMay Law Firm

10 s/ Maureen C. VanderMay
11 Maureen C. VanderMay, WSBA No. 16742
12 email: elfmanwa@vandermaylawfirm.com
13 The VanderMay Law Firm PC
14 2021 S. Jones Blvd.
15 Las Vegas, Nevada 89146
16 Of Attorneys for Plaintiff
17
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19
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